Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors*

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-04-8 OF 1998

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA

19 NOVEMBER 2002

Civil Procedure *— Judicial precedent — Federal Court — Decision of High Court overlooked relevant decision of Federal Court — Whether High Court had acted contrary to the doctrine of precedent*

Tort *— Negligence — Duty of care — Whether discharge of such duty dependent on facts of particular case — Whether degree of care dependent on magnitude of risk — Assumption of responsibility to perform professional or quasi-professional services for plaintiff relying on such services — Whether duty of care to be imposed — Assumption of responsibility and factum of reliance may be express or inferred from circumstances of each case*

Tort *— Negligence — Duty of care — Whether pre-existing contractual relationship necessary for duty of care to arise*

Tort *— Occupier's liability — Duty of care — Nature, scope and extent of duty owed by landlord to lawful visitors of his tenant*

Tort *— Occupier's liability — Duty of care — Whether duty of care owed by landlord of premises to lawful visitors of his tenant*

The first defendant (appellant) — a school, rented an old dwelling house from the second defendant (tenth respondent) — a local authority. The first defendant rented the house which belonged to the second defendant for use as a hostel to accommodate some of its students. The second defendant despite knowing that young children would live in the old house, did nothing to upgrade the building to ensure that it was safe for use as a hostel by young children. Subsequently a fire broke out in the house claiming the lives of several children and causing serious injury to others. An action was filed in the sessions court against the defendants in respect of the accident and at the conclusion of its trial, the sessions court judge found the defendants equally liable for the deaths and injuries caused by the fire. The first defendant appealed to the High Court contending that the second defendant should be held solely liable. The second defendant cross-appealed for the same purpose. The High Court however dismissed the appeal, allowed the cross appeal and awarded costs against the plaintiff. Whilst the High Court accepted the findings of fact made by the sessions court judge, it found for the second defendant purely on a point of law. The High Court decided that as a matter of law the second defendant whether as a landlord or a local

* The judgment of the learned sessions court judge, Ho Mooi Ching, is published immediately after this Court of Appeal judgment. See p 290.

authority owed no duty of care to the plaintiffs. The first defendant thus appealed to the Court of Appeal with leave. A

Held, allowing the appeal, setting aside the order of the High Court and restoring the order of the sessions court: B

(1) Whether the duty of care has been discharged in a given case depends on a number of factors present or absent on the peculiar fact pattern of the particular case. In other words, the degree of care that ought to be exercised depends among other matters on the magnitude of risk to which a plaintiff is exposed in particular circumstances. Presently, the law of tort imposes a duty of care on C a defendant who assumes responsibility to perform professional or quasi-professional services for a plaintiff who relies on those services. In such cases the relationship between the parties is itself sufficient without more to give rise to a duty on the part of the defendant to exercise reasonable skill and care in doing so. The assumption of responsibility and the factum of reliance may be D either express or may reasonably be inferred from the circumstances of the particular case. In the instant case, the sessions court judge would have been entirely justified in finding liability against the first defendant on the basis that it had assumed responsibility for the safety of the innocent pupils while they E resided at the hostel and the latter had in turn relied on the former to make the hostel reasonably safe (see pp 281C–D, H, 282A–B); *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103 and *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors* [1981] 2 MLJ 27 followed; *Hedley Byrne & Co v Heller & Partners* [1964] AC 465; *Smith v Eric S* F *Bush* [1989] 2 All ER 514 and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 referred.

(2) In Malaysia, the Federal Court decision of *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 accepted the proposition that *Donoghue v Stevenson* [1932] AC 562 G overrides cases that preceded it where courts insisted upon a pre-existing contractual relationship in order for a duty of care to arise. It is entirely up to our courts to develop our common law jurisprudence according to the needs of our local circumstances. This is in keeping with the common law tradition (see p 285D–E); *Invercargill City Council v Hamlin* [1996] 1 All ER 756 and H *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 followed. Following the jurisprudence encapsulated in the case of *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283, a landlord of premises stands in sufficiently close proximity to the lawful visitors of his tenant. In accordance with Malaysian common law, a landlord of I premises owes a duty of care to the lawful visitors of his tenant (see p 286A, C–D); *Cavalier v Pope* [1906] AC 428 distinguished;

AC Billings & Sons Ltd v Riden [1958] AC 240 and *Lembaga Kemajuan Tanah Persekutuan v Mariam* & Ors [1984] 1 MLJ 283 followed; *Travers v Gloucester Corporation* [1947] 1 KB 71 and *Sutherland Shire Council v Heyman* [1985] 157 CLR 424 referred.

(3) The nature, scope and extent of the duty owed by a landlord to the lawful visitors of his tenant is to ensure that the premises that are let out are safe for the purposes for which they are meant to be used and the defect complained of by the entrant must be a defect of which the landlord had knowledge or means of knowledge (see pp 286D–287C); *Jones v Bartlett* [2000] HCA 56 followed.

(4) The evidence on record showed that the second defendant, despite being a local authority whose duty it was to enforce compliance of the Uniform Building By-Laws 1986 ('the By-Laws'), did not comply with those very By-Laws when letting out the building in question to the first defendant. It did not take any steps to meet the requirements of the By-Laws in respect of the availability of a safe exit for occupants in the event of a fire. It was well aware that the building was to be used as a hostel for young children. In such circumstances the second defendant was not a bare landlord. It exposed the plaintiffs to the risk of injury by its failure to comply with the relevant By-Laws. It knew the purpose for which its property was to be used. It was also well aware of the harm that would ensue to the children by reason of the absence or inadequacy of fire escape exits. Accordingly, the second defendant as the landlord of the premises in question owed a duty of care to the lawful visitors of its tenant and was in breach of that duty (see pp 287F–288B); *Donoghue v Stevenson* [1932] AC 562 and *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 followed.

(5) The High Court erred in important respects. By refusing to apply *AC Billings & Sons Ltd v Riden* [1958] AC 240 on the ground that it was a case decided after the coming into force of the Civil Law Act 1956, it overlooked the decision of the Federal Court in *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 which applied *AC Billings* and was a decision binding on it. The High Court had thus acted contrary to the doctrine of precedent. The High Court's interpretation of s 3 of the Civil Law Act 1956 did not also accord with the decision of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 which decision was also binding on it. As an appellate court will not disturb the apportionment of liability for an accident made by the trial court except in the rarest of cases — and the present case was not such a case — the apportionment of equal liability by the sessions court had to be restored. The High Court had found the first defendant 100% liable on a ground of law with which the Court of Appeal could not agree (see pp 288E–F, 289C–D); *AC Billings & Sons Ltd v Riden* [1958] AC 240; *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 and *Chung*

Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 followed. A

[Bahasa Malaysia summary

Defendan pertama (perayu) — sebuah sekolah, telah menyewa sebuah rumah kediaman lama daripada defendan kedua (responden kesepuluh) — satu badan berkuasa. Defendan pertama telah menyewa rumah tersebut yang dimiliki oleh defendan kedua untuk digunakan sebagai sebuah asrama bagi menempatkan beberapa orang penuntutnya. Defendan kedua walaupun mengetahui bahawa budak-budak akan tinggal di rumah lama tersebut, tidak membuat apa-apa pembaikan ke atas bangunan tersebut bagi memastikan ia selamat untuk digunakan sebagai sebuah asrama untuk budak-budak. Selepas itu satu kebakaran telah berlaku dalam rumah tersebut yang meragut nyawa beberapa orang budak tersebut dan menyebabkan yang lain mengalami kecederaan serius. Satu tindakan telah difailkan di mahkamah sesyen terhadap defendan-defendan berhubung kemalangan tersebut dan di penutup perbicaraannya, hakim mahkamah sesyen mendapati defendan-defendan bersama-sama bertanggungjawab atas kematian dan kecederaan akibat kebakaran tersebut. Defendan pertama telah merayu ke Mahkamah Tinggi dengan menghujahkan bahawa defendan kedua sepatutnya menanggung tanggungjawab sepenuhnya. Defendan kedua telah membuat rayuan balas bagi tujuan yang sama. Mahkamah Tinggi bagaimanapun telah menolak rayuan tersebut, membenarkan rayuan balas tersebut dan mengawardkan kos terhadap plaintif. Walaupun Mahkamah Tinggi menerima penemuan-penemuan fakta yang dibuat oleh hakim mahkamah sesyen, ia berpihak kepada defendan kedua semata-mata berdasarkan undang-undang. Mahkamah Tinggi telah memutuskan bahawa berdasarkan undang-undang defendan kedua sama ada sebagai tuanpunya tanah atau satu badan berkuasa tidak mempunyai kewajipan berjaga-jaga ke atas plaintif-plaintif. Defendan pertama oleh itu telah merayu ke Mahkamah Rayuan dengan kebenaran. B C D E F G

Diputuskan, membenarkan rayuan tersebut, mengenepikan perintah Mahkamah Tinggi dan mengekalkan perintah mahkamah sesyen:

(1) Sama ada kewajipan berjaga-jaga telah dilepaskan dalam suatu kes bergantung kepada faktor-faktor yang wujud atau tiada dalam corak fakta khusus kes tertentu. Dalam perkataan lain, tahap berjaga-jaga yang patut ada bergantung kepada, antara perkara lain, besarnya pendedahan plaintif terhadap risiko-risiko dalam keadaan-keadaan yang tertentu. Pada ketika ini, undang-undang tort mengenakan satu kewajipan berjaga-jaga ke atas defendan yang menerima tanggungjawab untuk melaksanakan khidmat profesional atau quasi-profesional untuk plaintif yang bergantung kepada khidmat tersebut. Dalam keadaan demikian, H I

hubungan antara pihak-pihak adalah dengan sendirinya mencukupi tanpa perlu menimbulkan satu kewajipan di pihak defendan untuk mengambil sikap mahir dan berjaga-jaga yang munasabah semasa berbuat demikian. Penerimaan tanggungjawab dan faktor pergantungan boleh dinyatakan atau boleh disimpulkan daripada keadaan-keadaan kes tertentu. Dalam kes semasa, hakim mahkamah sesyen mempunyai justifikasi dalam penemuan liabiliti terhadap defendan pertama berdasarkan ia telah menerima tanggungjawab untuk keselamatan penuntut-penuntut yang tidak bersalah semasa mereka menetap di asrama tersebut dan penuntut-penuntut tersebut juga bergantung kepada defendan pertama untuk menjadikan asrama tersebut selamat untuk diduduki (lihat ms 281C–D, H, 282A–B); *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103 dan *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors* [1981] 2 MLJ 27diikut; *Hedley Byrne & Co v Heller & Partners* [1964] AC 465; *Smith v Eric S Bush* [1989] 2 All ER 514 dan *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 dirujuk.

(2) Di Malaysia, keputusan Mahkamah Persekutuan dalam *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 menerima kenyataan bahawa *Donoghue v Stevenson* [1932] AC 562 mengatasi kes-kes yang sebelumnya di mana mahkamah menegaskan perlunya satu hubungan kontraktual wujud sebelum satu kewajipan berjaga-jaga timbul. Ia terpulang sepenuhnya kepada mahkamah kita untuk membentuk jurisprudens common law menurut keperluan keadaan tempatan di sini (lihat ms 285D–E); *Invercargill City Council v Hamlin* [1996] 1 All ER 756 dan *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 diikut. Mengikut jurisprudens yang terkandung dalam *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283, seorang tuanpunya tanah suatu premis mempunyai keadaan berdekatan yang mencukupi terhadap tetamu-tetamu penyewanya yang sah. Menurut common law Malaysia, seorang tuanpunya tanah suatu premis mempunyai satu kewajipan berjaga-jaga kepada tetamu penyewanya yang sah (lihat ms 286A, C–D); *Cavalier v Pope* [1906] AC 428 dibeza; *AC Billings & Sons Ltd v Riden* [1958] AC 240 dan *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 diikut; *Travers v Gloucester Corporation* [1947] 1 KB 71 dan *Sutherland Shire Council v Heyman* [1985] 157 CLR 424 dirujuk.

(3) Sifat, skop dan setakat mana kewajipan seorang tuanpunya tanah kepada tetamu-tetamu penyewanya yang sah adalah untuk memastikan bahawa premis yang disewakan adalah selamat bagi tujuan ia digunakan dan kerosakan yang diadukan oleh orang yang masuk tersebut mestilah satu kerosakan yang mana tuanpunya tanah mempunyai pengetahuan atau sumber pengetahuan (lihat ms 286D–287C).

(4) Keterangan atas rekod menunjukkan bahawa defendan kedua, meskipun merupakan satu badan berkuasa tempatan yang mempunyai kewajipan untuk menguatkuasakan kepatuhan Undang-Undang Kecil Bangunan Seragam 1986 ('Undang-Undang Kecil tersebut'), telah tidak mematuhi Undang-Undang Kecil tersebut apabila ia menyewakan bangunan yang dipersoalkan kepada defendan pertama. Ia tidak mengambil apa-apa langkah untuk memenuhi keperluan-keperluan Undang-Undang Kecil tersebut berhubung kewujudan satu jalan keluar untuk penghuni-penghuni jika berlaku kebakaran. Ia juga sedar bahawa bangunan tersebut digunakan sebagai asrama untuk budak-budak. Dalam keadaan sedemikian, defendan kedua bukan seorang tuanpunya tanah kosong. Ia mendedahkan plaintif-plaintif kepada risiko kecederaan oleh sebab kegagalannya untuk mematuhi Undang-Undang Kecil tersebut yang relevan. Ia mengetahui tujuan hartanah tersebut digunakan. Ia juga memang sedar tentang kecederaan yang akan menimpa budak-budak tersebut oleh sebab ketiadaan jalan keluar kecemasan semasa kebakaran yang mencukupi. Sewajarnya, defendan kedua sebagai tuanpunya tanah premis yang dipersoalkan mempunyai kewajipan berjaga-jaga kepada tetamu-tetamu sah penyewanya dan telah melanggar kewajipan tersebut (lihat ms 287F–288B); *Donoghue v Stevenson* [1932] AC 562 dan *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 diikut.

(5) Mahkamah Tinggi telah terkhilaf dalam aspek-aspek penting. Dalam keengganannya untuk memakai *AC Billings & Sons Ltd v Riden* [1958] AC 240 atas alasan ia merupakan satu kes yang diputuskan selepas penguatkuasaan Akta Undang-Undang Sivil 1956, ia telah terlepas perhatian tentang keputusan Mahkamah Persekutuan dalam *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283 yang memakai *AC Billings* dan ia adalah satu keputusan yang mengikatnya. Mahkamah Tinggi oleh itu telah bertindak bertentangan dengan doktrin duluan. Tafsiran Mahkamah Tinggi terhadap s 3 Akta Undang-Undang Sivil 1956 juga tidak bersependapat dengan *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 di mana keputusannya juga mengikatnya. Memandangkan satu mahkamah rayuan tidak akan campur tangan dalam pembahagian liabiliti suatu kemalangan yang dibuat oleh mahkamah perbicaraan kecuali dalam kes-kes yang jarang sekali — dan dalam kes sekarang bukan kes sedemikian — pembahagian liabiliti yang sama rata oleh mahkamah sesyen harus dikekalkan. Mahkamah Tinggi mendapati defendan pertama bertanggungjawab 100% atas satu alasan undang-undang yang Mahkamah Rayuan tidak bersetuju (lihat ms 288E–F, 289C–D); *AC Billings & Sons Ltd v Riden* [1958] AC 240; *Lembaga Kemajuan Tanah Persekutuan v Mariam* & Ors [1984] 1 MLJ 283 dan *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* diikut.]

A **Notes**

For cases on the duty of care in negligence, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 687–694.

For cases on judicial precedent, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3611–3612.

B For cases on occupier's liability, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1186–1189.

Cases referred to

AC Billings & Sons Ltd v Riden [1958] AC 240 (folld)

C *Cavalier v Pope* [1906] AC 428 (distd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 (folld)

Donoghue v Stevenson [1932] AC 562 (folld)

Government of Malaysia & Ors v Jumat bin Mahmud & Anor [1977] 2 MLJ 103 (folld)

D *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465 (refd)

Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 (refd)

Invercargill City Council v Hamlin [1996] 1 All ER 756 (folld)

Jones v Bartlett [2000] HCA 56 (folld)

Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors [1984] 1 MLJ 283 (folld)

E

Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors [1981] 2 MLJ 27 (folld)

Pyrenees Shire Council v Day (1998) 151 ALR 147 (refd)

Robbins v Jones [1863] 143 ER 768 (refd)

Smith v Eric S Bush [1989] 2 All ER 514 (refd)

F *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors* [1998] 3 AMR 284 (refd)

Stovin v Wise [1996] 3 All ER 801 (refd)

Sutherland Shire Council v Heyman [1985] 157 CLR 424 (refd)

Travers v Gloucester Corporation [1947] 1 KB 71 (refd)

Union of India v United India Assurance Co Ltd AIR 1998 SC 640 (refd)

G

Legislation referred to

Civil Law Act 1956 s 3(1)

Occupiers Liability Act 1957

H Uniform Building By-Laws 1986

Appeal from: Civil Appeal No 12–46 of 1995 (High Court, Pulau Pinang)

Jagdeep Singh Deo (*Karpal Singh* with him) (*Karpal Singh & Co*) for the appellant.

I *M Thayalan* (*Thayalan & Assoc*) for the first to ninth respondents.

Gurbachan Singh (*Mohamed Aslam bin Mohamed Mydin* and *Meyappan* with him) (*Presgrave & Matthews*) for the tenth respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

The facts

In the early hours of the morning of 16 February 1989, a fire broke out in the building at No 1, Park Road, Pulau Pinang. It claimed several lives and caused serious injury to others. They were all young children. We will say in a moment how they came to be there.

For convenience, we will refer to the parties to this appeal by the title assigned to each of them in the court of first instance.

The first defendant is a school. It has a campus in Pulau Pinang. It needed a hostel to accommodate some of its students there. It found a building, a very old dwelling house. According to the unchallenged evidence, the building had been in existence even before 1922.

The second defendant is a local authority. It owned the building in question. It let the old building out to the first defendant. It knew very well the use to which the first defendant would put the building. It knew that young children would live in that old building. But it did nothing to upgrade the building to ensure that it was safe for use as a hostel by young children. That much is borne out by the evidence. And there is no serious dispute about this.

In all the letting was for three years. The initial term was for two years from 20 December 1986 until 19 December 1988. This was later extended to 19 December 1989. Throughout the term, the premises were used as a hostel. Young children who attended the first defendant's school lived there. And that is why they were there on the day of the tragedy.

The judgment of the sessions court

In due course, an action was filed in the sessions court against the defendants in respect of the accident. The second defendant's position was attacked both in its capacity as a landlord and a local authority. There was a fairly lengthy trial. At its conclusion, the court found for the plaintiffs. In an exceptionally well-reasoned judgment,† the learned sessions court judge (Ms Ho Mooi Cheng) held the defendants equally liable for the deaths and the injury caused by the fire.

She took the case before her through the correct steps of legal reasoning. First, she carefully analyzed the evidence including that of the expert witness ('PW3') called by the plaintiffs. Having done so, she came to the conclusion that the premises were unsafe at the material time. Next, she turned to the law, in particular to the basis on which liability might properly be founded against the first defendant. She held, quite rightly, that the first defendant and its affected pupils stood in a special relationship to each other and that accordingly a duty of care was owed by the former to the latter. In arriving at this conclusion, she correctly directed herself on the law by

† See p 280 for the judgment.

applying the following dictum of Raja Azlan Shah FJ (as he then was) in *Government of Malaysia & Ors v Jumat bin Mahmud & Anor* [1977] 2 MLJ 103, at p 104:

> It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take of his own children (see *Ricketts v Erith Borough Council* [1943] 2 All ER 629, 631). It is not a duty of insurance against harm but only a duty to take reasonable care for the safety of the pupil.

We pause to make two points. First, it must be noted that the aforesaid dictum of Raja Azlan Shah FJ contains a statement in very general terms of the nature of the duty owed by a teacher to his or her pupil. However, whether the duty has been discharged in a given case depends upon a number of factors present or absent on the peculiar fact pattern of the particular case. In other words, the degree of care that ought to be exercised depends, among other matters, on the magnitude of risk to which a plaintiff is exposed in particular circumstances. Thus, as Salleh Abas FJ observed in *Mohamed Raihan bin Ibrahim & Anor v Government of Malaysia & Ors* [1981] 2 MLJ 27, at p 28:

> In conclusion we are of the opinion that having regards to what we have discussed above, the respondents were therefore negligent for failing to take all reasonable and proper steps to prevent the appellant under their care from sustaining the injury and that their teacher did not check the condition of the garden tools nor provided a safe system of holding the gardening class. This is not a case where the teacher, as in the case of *Government of Malaysia & Ors v Jumat bin Mohamed & Anor* [1977] 2 MLJ 103, had provided sufficient supervision but could not prevent the injury from being inflicted because of the stupidity of a pupil, whose exuberant behaviour was unknown to the teacher. But this is a case where a teacher appreciating that the boys were handling dangerous instruments had not given sufficient warning as to their use nor had she taken steps to see that pupils were positioned within such distance between them as to avoid injuries from being inflicted. There is a world of difference between the use of a changkol and that of a pencil.

The second point we make is this. There has been, at least since the late 1980's a development in the tort of negligence through a process by which the principle stated in *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465 in relation to pure economic loss caused by careless statements has been incrementally extended. At present, the law of tort imposes a duty of care on a defendant who assumes responsibility to perform professional or quasi-professional services for a plaintiff who relies on those services. It is important to emphasize that in such cases, the relationship between the parties is itself sufficient, without more, to give rise to a duty on the part of the defendant (who provides the services) to exercise reasonable skill and care in doing so (see *Smith v Eric S Bush* [1989] 2 All ER 514; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145). It may also be added for good

measure that the assumption of responsibility and the factum of reliance may be either express (as in *Hedley Byrne & Co v Heller & Partners Ltd*) or may reasonably be inferred from the circumstances of the particular case (as happened in *Henderson v Merrett Syndicates Ltd*). A

So too here. The learned sessions court judge, when she wrote her judgment in May 1995, would have been entirely justified in finding liability against the first defendant on the basis that it has assumed responsibility for the safety of the innocent pupils while they resided at the hostel and that the latter had in turn relied on the former to make the hostel reasonably safe. B

We return to the sessions court's judgment. Having found against the first defendant, the learned sessions court judge proceeded to find liability against the second defendant. She appears to have treated the case against this defendant as being a straightforward application of *Donoghue v Stevenson* [1932] AC 562. It is this part of her judgment that has attracted controversy in the present appeal. Whether she was right in the approach she took is a matter that we will address later in this judgment. C D

The judgment of the High Court

The first defendant was unhappy with the finding of negligence made against it. It appealed to the High Court. It wanted the second defendant to be held solely liable for the accidental fire. The second defendant cross-appealed for the same purpose. The High Court dismissed the appeal but allowed the cross appeal. It awarded costs against the plaintiffs although they had not appealed and played only a passive role throughout the intermediate appeal. The High Court accepted the findings of fact made by the sessions court. It found for the second defendant purely on a point of law. It held that as a matter of law, the second defendant whether as a landlord or a local authority owed no duty of care to the plaintiffs. E F

The basis of the High Court's findings appear sufficiently from its judgment which is to be found in *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee & Ors* [1998] 3 AMR 2847. We will merely summarize the main grounds which the High Court advanced for allowing the second defendant's cross appeal. These are, first, the second defendant owed no duty to the plaintiffs in its capacity as landlord because of the rule in *Cavalier v Pope* [1906] AC 428. Second, the common law rules governing an occupier's liability continue to operate in Malaysia although the position in England had been altered by the Occupiers Liability Act 1957. Third, the decision of the House of Lords in *AC Billings & Sons Ltd v Riden* [1958] AC 240 had made an inroad into *Cavalier v Pope* but that decision could not be applied here because it came after 7 April 1956, the determinative date set by s 3(1) of the Civil Law Act 1956 for the application of English common law by our courts. Fourth, that there was no reason to rely on the proviso to s 3(1) to — in the words of the statute — make such qualifications as local circumstances render necessary. G H I

The summary of the High Court's views on this head of liability appear in the following passage of its judgment (at p 2866):

A As can be seen from these authorities, the general rule is that (it appears that in England 'was'), apart from any express or implied contract, the landlord is under no duty to his tenant or any other person who enters the demised premises during the tenancy, to take care that the premises are safe, whether at the commencement of the tenancy or during its continuance. The lease transfers all obligations towards third parties from the landlord to the tenant.

B As a result, the landlord, who can no longer be regarded as the occupier of the demised premises is exempted from liability for any dangers existing on them. In England, one of the first steps in the erosion of this immunity of the lessor came from the decision of the House of Lords in *AC Billings & Sons Ltd v Riden* [1958] AC 240. (Note the date). In England today, the immunity has largely disappeared, *principally in consequence of legislation,* namely the C Occupiers Liability Act 1957 and the Defective Premises Act 1972 (both English statutes). However the decision in *Cavalier v Pope* is still the law in England, where the facts fall outside the scope of the said legislation.

This reminds us of the danger of following post-1956 English cases *which were in fact based on new legislation there.*

D In my view the common law on 7 April 1956 is as stated by the learned authors referred to above and as stated in *Cavalier v Pope* and *Bottomley v Bannister.* I do not see any reason why I should invoke the proviso to s 3(1) of the Civil Law Act 1956 'to make such qualifications as local circumstances render necessary'. (Emphasis added.)

Having negatived the second defendant's liability as a landlord in tort, the E High Court went on to examine whether there was any liability in contract. It held there was none. It also negatived the second defendant's liability in tort in its capacity as a local authority for failing to enforce the relevant building by-laws in respect of its building.

Against the High Court's decision, the first defendant has appealed to F this court with leave.

Does a landlord owe a duty of care to his tenant's lawful visitors?

Before us, all points advanced in the courts below were taken. In view of its peculiar importance, we propose to deal with so much of the first G defendant's case that is directed against the nature and extent of the duty of care, if any, owed by the second defendant in its capacity as landlord to the plaintiffs.

The starting point is, of course, *Cavalier v Pope.* That case concerned a dilapidated house which the owner had let unfurnished to the tenant. There H was no written agreement governing the letting. The flooring of the kitchen was in a defective condition and the tenant and his wife threatened to leave. The landlord's agent promised that, if the tenant stayed, repairs would be made. Some months later, but before any repairs had been made, the wife (the appellant) fell through the kitchen floor. The appellant and her husband brought an action for breach of contract against the landlord. The I husband succeeded at trial. But it was the wife's claim that was the subject of the appeal before the House of Lords. She failed on the basis that she was not privy to the contract of repair between her husband and the landlord's

agent. An examination of the speeches of the Law Lords reveals no reference whatsoever to the tort of negligence.

When dealing with that decision, it is important to bear in mind that the House there was not laying down any new rule. It was merely affirming the decision in *Robbins v Jones* [1863] 143 ER 768 where Erle CJ said:

> A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any.

In our view, *Cavalier v Pope* is merely an illustration of the application of the doctrine of privity of contract. It is not a case in tort.

We next turn to *AC Billings v Riden* [1958] AC 240. We find it sufficient to quote from the headnote of the report:

> Contractors reconstructing the front approach to a house in which lived a caretaker and his wife so obstructed the normal approach that it became impassable. Their workmen suggested to the caretaker's wife that persons might go in and out of the house by using the forecourt of the house next door, a route involving danger because it led through a narrow way between bushes and the unfenced sunk area of the house. On a November evening after dark the respondent, a woman of 71, visiting the caretaker and his wife by invitation, used that way in on the wife's suggestion. In leaving by the same way; after declining an offer to escort her, she fell into the area next door sustaining injuries:
>
> Held, that the contractors had been negligent and were liable in damages to the respondent, who, although she was guilty of contributory negligence, did not act unreasonably in attempting to use the alternative means of egress.
>
> The contractors owed a duty to all persons who might be expected lawfully to visit the house to take such care as was, in all the circumstances, reasonable to ensure that they were not exposed to danger. Where, as here, the respondent was aware of the danger but, in all the circumstances, a reasonable person would have risked incurring it, the contractors were not absolved from liability either by giving a warning or by reliance on the respondent's knowledge. In considering what a reasonable person would realise or would do in a particular situation, regard must be had to human nature, and if, in that situation, the great majority of people would behave in one way, it is not right to say that a reasonable man would have behaved in another.

AC Billings v Riden was applied with approval by the former Federal Court in *Lembaga Kemajuan Tanah Persekutuan v Mariam & Ors* [1984] 1 MLJ 283. Salleh Abas CJ (Malaya) said at pp 284–285:

> As to the issue of negligence, Felda did not know that the contractor in breach of the agreement with Felda had sub-contracted the work. Counsel for Felda, therefore, submitted that as the subcontract was unauthorized, the sub-contractor's employee, ie the deceased, must in the circumstances of the case be a trespasser and as such Felda owed him no duty of care at all.
>
> With respect, we disagree. The submission seems to us to be an attempt to revive a notion which had long been discarded in that tortious liability depends upon contractual relationship and that since Felda and the deceased had no contractual relationship with each other, Felda therefore owed no duty of care to him at all.

A This notion was abandoned in England by the House of Lords in *Donoghue v Stevenson* [1932] AC 562, 580 and it was, to paraphrase Professor Winfield, given a 'decent burial' by the Privy Council in *Grant v Australian Knitting Mills Ltd* [1936] AC 85, 101–102. An attempt to revive it was repelled by Lord Denning in *Greene v Chelsea Borough Council* [1954] 2 QB 127, 138. *These cases establish that a person owes a duty of care even to persons who have no* B *contractual relationship with him, and that his liability to an injured person depends upon whether the injury was caused by his act or omission. It is the nature of his act and omission that makes him liable.* Thus a contractor who obstructed the normal approach to a house which he was engaged to reconstruct was held liable to a visitor of the house, when the latter was injured as a result of using a dangerous alternative access, despite the fact that the visitor had been informed of and appreciated the danger (see *AC Billings & Sons Ltd v Riden* C [1958] AC 240). The duty cast upon the contractor in this case was not derived from the contract between him and the owner of the house but one which is cast by law in that because of the danger created by him, he must take a reasonable care to ensure that visitors were not exposed to it. (Emphasis added.)

D The importance of the decision of the Federal Court in *Lembaga Kemajuan Tanah Persekutuan v Mariam* lies in the acceptance in Malaysia of the proposition that *Donoghue v Stevenson* has had an overriding effect upon cases that preceded it where courts insisted upon a pre-existing contractual relationship in order for a duty of care to arise. *Cavalier v Pope* is one such case. Accordingly, it is in our view irrelevant that the courts in England E regard *Cavalier v Pope* as being unaffected by the Delphic pronouncement of Lord Atkin in *Donoghue*. See, for example, *Travers v Gloucester Corporation* [1947] 1 KB 71, a case cited by learned counsel for the second defendant. It is entirely up to our courts to develop our common law jurisprudence according to the needs of our local circumstances. The Privy Council accepts this to be in keeping with the common law tradition. So, in F *Invercargill City Council v Hamlin* [1996] 1 All ER 756, Lord Lloyd Berwick said at p 764:

> But in the present case, the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must G surely be 'Yes'. The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.

H The approach of our courts to the development of our common law is to be found in the judgment of Hashim Yeop A Sani CJ (Malaya) delivered in the Supreme Court case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 where he said at p 361:

> Section 3 of the Civil Law Act 1956 directs the courts to apply the common I law of England only in so far as the circumstances permit and save where no provision has been made by statute law. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the courts of this country.

Following the jurisprudence encapsulated in *Lembaga Kemajuan Tanah Persekutuan v Mariam*, in our judgment, a landlord of premises stands in sufficiently close proximity to the lawful visitors of his tenant. And the latter is certainly someone whom the former ought to have in his contemplation when letting out his building. In short, the relationship under discussion falls squarely within the Atkinian formula. We take this opportunity to point out that our decision is entirely in keeping with the common law philosophy in relation to the tort of negligence. That philosophy was expressed by Brennan J in *Sutherland Shire Council v Heyman* [1985] 157 CLR 424 at p 481:

> It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty.

For the foregoing reasons, we hold that in accordance with our common law, a landlord of premises owes a duty of care to the lawful visitors of his tenant.

The nature, scope and extent of the duty

As for the nature and scope of the duty owed by a landlord to the lawful visitors of his tenant, we refer to two passages in the joint judgment of Gummow and Hayne JJ in the Australian High Court in *Jones v Bartlett* [2000] HCA 56. In the first passage, their Honours when dealing with the nature of the duty of care owed by a landlord to his tenant said:

> The relationship between landlord and tenant is so close and direct that the landlord is obliged to take reasonable care that the tenant not suffer injury. In considering the degree of care which must be taken, and the means by which a tenant may be injured, it must be borne in mind, as already discussed, that ordinarily the landlord will surrender occupation of the premises to the tenant. Thus, the content of any duty is likely to be less than that owed by an owner-occupier who retains the ability to direct what is done upon, with and to the premises. *Broadly, the content of the landlord's duty to the tenant will be conterminous with a requirement that the premises be reasonably fit for the purposes for which they are let,* namely habitation as a domestic residence. (Emphasis added.)

In the second passage they said:

> [D]angerous defects are unlikely to discriminate between tenants and those on the premises whether as an incident of a familial or other personal relationship, as in this case, *Cavalier v Pope,* and *Northern Sandblasting,* [the reference here is to *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313] or some other social or business relationship or occasion. *The landlord's duty to take reasonable care that the premises contained no dangerous defects, owed in the sense earlier described to the tenants, extends to those other entrants we have identified.*
>
> Nevertheless, *the duty of the landlord owed to these third parties, in many cases, will be narrower than that owed to them by an occupier such as a tenant.* An

> example of facts not involving the placing of a duty on the landlord is a slippery floor; an unsecured gate to a fenced swimming pool may be another. *The duty of care of the landlord to the third party is only attracted by the presence of dangerous defects in the sense identified earlier in these reasons. These involve dangers arising not merely from occupation and possession of premises, but from the letting out of premises as safe for purposes for which they were not safe. What must be involved is a dangerous defect of which the landlord knew or ought to have known.*' (Emphasis added.)

To summarize, the duty owed by a landlord to the lawful visitors of his tenant is to ensure that the premises that are let out are safe for the purposes for which they are meant to be used and the defect complained of by the entrant must be a defect of which the landlord had knowledge or means of knowledge. This then is the nature, scope and extent of the duty in question.

We now turn to deal with the present appeal.

The present appeal

Learned counsel for the second defendant has argued against the imposition of any duty of care on his client in the circumstances of the present case. He says that his client, unlike the statutory body in *Lembaga Kemajuan Tanah Persekutuan v Mariam*, was a bare landlord in the sense that it was not engaged in any positive act on the premises that produced the harm suffered by the plaintiffs.

This is no doubt an important argument. For, as a matter of policy the law governing the tort of negligence does not, as a general rule, impose liability for omissions.

But a closer look at the principle reveals that it protects only pure omissions. It does not apply to a case where a defendant creates a danger, eg, by leaving an unlit vehicle on the highway. In such a case, the defendant would be under a duty to warn others of the danger he has created.

Learned counsel for the plaintiffs has drawn our attention to the evidence on record which clearly shows that the second defendant, despite being a local authority whose duty it is to enforce compliance of the Uniform Building By-Laws 1986 ('the By-Laws') did not comply with those very By-Laws when letting out the building in question to the first defendant. It is plain from the evidence that the second defendant did not take any steps to meet the requirements of the By-Laws particularly in respect of the availability of a safe exit for occupants in the event of a fire. That indeed was the finding of the sessions court. Add to this the fact that the second defendant was well aware that the building was to be used as a hostel to be occupied by young children. In these circumstances we agree with learned counsel for the plaintiffs that the second defendant was not a bare landlord. The second defendant did in fact expose the plaintiffs to the risk of injury by its failure to comply with the relevant By-Laws.

Like the manufacturer of the product in *Donoghue*, the second defendant here knew the purpose for which his property was to be used.

Equally, it was well aware of the harm that would ensue to the children by reason of the absence or inadequacy of fire escape exits. A

It follows that we are not, in the present instance, extending the law of negligence into a new field. We are not even making an incremental advance. All that is required of us here is a straightforward application of *Donoghue v Stevenson*. The ground for this is, as we have already said, established by *Lembaga Kemajuan Tanah Persekutuan v Mariam*. We therefore reject the submission of learned counsel for the second defendant. B

For the foregoing reasons, we hold that the second defendant as the landlord of the premises in question did owe a duty of care to the lawful visitors of his tenant and was in breach of that duty. C

Was the High Court right?

It is apparent for the reasons given thus far that we are unable to agree with the decision of the High Court. In our view, that court erred in important respects. D

In the first place, it refused to apply *AC Billings v Riden*, apparently on the ground that it was a case decided after the coming into force of the Civil Law Act 1956. The High Court appears to have overlooked the decision of the Federal Court in *Lembaga Kemajuan Tanah Persekutuan v Mariam*, which applied *AC Billings v Riden* and was a decision that was plainly binding on it. Accordingly, in our respectful view, the High Court acted contrary to the doctrine of precedent. E

Further, the High Court's interpretation of the proviso to s 3 of the Civil Law Act 1956 does not accord with the interpretation given to that provision by the CJ (Malaya) in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*. Again, the High Court overlooked this decision also plainly binding on it. F

The local authority point

The High Court also reversed the sessions court on the ground that the second defendant in its capacity as a local authority did not owe a duty of care as a matter of law. This finding was attacked before us by counsel for the first defendant. We were referred to *Stovin v Wise* [1996] 3 All ER 801. The majority speeches in the House in that case support the second defendant here. G H

But our attention was drawn to the powerful dissent of Lords Nicholls of Birkenhead and Slynn of Hadley and we were invited to adopt these in preference to the views of the majority. We note that the courts of Australia have indeed done so. See, *Pyrenees Shire Council v Day* [1998] 151 ALR 147. The Supreme Court of India in *Union of India v United India Assurance Co Ltd* AIR 1998 SC 640, in a judgment delivered by that most learned and eminent judge Jagannadha Rao J, has also developed jurisprudence in keeping with the views of the minority in *Stovin*'s case. I

We have found the discussion of the cases and the argument addressed to us on the point to be of much interest. It is a point of law which our courts may have to resolve in some case in the future. But the present instance is not the case for this court to do that. The approach we have taken will render any views we express on the subject pure obiter. We therefore decline to enter upon this part of the case.

The apportionment of liability

The sessions court found the defendants equally liable. When opening the appeal, counsel for the first defendant argued that it is the second defendant which ought to be held solely liable. However, under pressure of argument, counsel retreated from his earlier position and conceded that the apportionment of liability inter se the defendants made by the sessions court should be restored.

Counsel was correct in the concession he made. Save in the rarest of cases — and the present instance is not such a case — an appellate court will not disturb the apportionment of liability for an accident made by the trial court. The High Court found the first defendant 100% liable. But it did so on a ground of law with which we do not agree. Accordingly, the apportionment by the sessions court must be restored.

The result

For the reasons already given, the appeal is allowed. The order of the High Court in all respects is set aside. The order of the sessions court is restored. The second defendant will pay all the costs of the plaintiffs and the first defendant at all levels except costs in the sessions court, that is to say, that the plaintiffs and the first defendant will tax their respective bills against the second defendant.

Before we conclude, we would like to thank all counsel for their careful argument. But we must make special mention of Mr Gurubachan Singh and Mr Thayalan who appeared for the second defendant and the plaintiffs respectively. The brevity of their argument and their citation of relevant cases has made our task far less burdensome.

Appeal allowed, order of the High Court set aside and order of the sessions court restored.

Reported by Andrew Christopher Simon